

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C 01-2659 CW

IN RE TUT SYSTEMS, INC. SECURITIES
LITIGATION

ORDER DENYING MOTION
FOR PAYMENT OF
DAMAGES AND MOTION
TO AWARD ATTORNEYS'
FEES

In 2004, this class action settled. Horacio Yusty, Andres Jaramillo and Rodrigo Jaramillo contend that, although they were named Plaintiffs in the original complaint, they did not receive notice of the settlement, nor did they receive their share of the settlement proceeds. They seek undisclosed damages and sanctions against the law firm of Lerach Coughlin Stoia Geller Rudman & Robbins LLP, whom the Court appointed as co-lead counsel. Bruce G. Murphy, who purports to represent Messrs. Yusty and Jaramillo, seeks to recover attorneys' fees that he contends Lerach Coughlin

1 owes him.¹ Lerach Coughlin opposes the motions. The hearing
2 scheduled for June 21, 2007 is vacated and the matter is submitted
3 on the papers. Having considered the papers filed by the parties,
4 the Court denies both motions.

5 BACKGROUND

6 In late 2000 or early 2001, Mr. Murphy contacted Dave Walton,
7 a Lerach Coughlin partner, who at the time was a partner at Milberg
8 Weiss Bershad Hynes & Lerach LLP,² about a potential securities
9 fraud case against Tut Systems, Inc. After Mr. Murphy's clients,
10 Messrs. Yusty and Jaramillo, had purchased Tut Systems stock, the
11 price of the stock had dropped. Mr. Murphy believed that, based on
12 his investigation, the price drop may have resulted from violations
13 of federal securities law. The price of Tut Systems' stock dropped
14 even more after Mr. Murphy met with Mr. Walton, who conducted his
15 own investigation into whether a cause of action existed.

16 Mr. Murphy contacted Mr. Walton again, informing him that his
17 clients were interested in filing a lawsuit against Tut Systems.
18 For referring his clients to Milberg Weiss, Mr. Murphy expected a
19 referral fee. According to Mr. Murphy, Milberg Weiss had
20 previously agreed to pay him ten percent of any court-approved fees
21 it received in cases in which he referred a client to Milberg

22
23 ¹Mr. Murphy states that he is licensed to practice before the
24 courts of the Commonwealth of Virginia. He is not admitted to
appear in this Court, nor has he filed a motion to appear pro hac
vice. According to the pleadings, he appears pro se.

25 ²On May 1, 2004, certain lawyers at Milberg Weiss withdrew
26 from the partnership and formed Lerach Coughlin. The lawyers who
27 worked on the Tut Systems Security Litigation all joined Lerach
Coughlin and continued to represent the Lead Plaintiffs and
settlement class.

1 Weiss. Mr. Murphy claims that Milberg Weiss has paid him a ten
2 percent referral fee in at least sixteen previous cases. Mr.
3 Walton states that he did not agree to pay Mr. Murphy any type of
4 fee and was not aware of a pre-existing fee arrangement with Mr.
5 Murphy. William Lerach also states that he did not agree, nor was
6 there a pre-existing arrangement, that Mr. Murphy would receive a
7 ten percent referral fee.

8 Milberg Weiss decided to bring a lawsuit against Tut Systems.
9 Mr. Walton drafted a complaint and then sent it to Mr. Murphy for
10 his clients to review. Mr. Walton did not have direct contact with
11 Mr. Murphy's clients, nor did he have their contact information.
12 Mr. Murphy's clients approved the complaint, and Milberg Weiss
13 filed the complaint on their behalf; the complaint listed Mr.
14 Murphy and attorneys at Milberg Weiss as co-counsel.

15 Six other cases were filed against Tut Systems. Milberg Weiss
16 was co-counsel on five of those six cases. The Court consolidated
17 all seven cases. On December 12, 2001, the Court appointed Mark
18 Krist and Robin Avery as Lead Plaintiffs. Because Mr. Murphy's
19 clients each had purchased only one hundred shares of Tut Systems'
20 common stock, they were not considered for Lead Plaintiff
21 positions. The Court also appointed the law firms of Milberg Weiss
22 and Weiss & Yourman as co-lead counsel. Mr. Murphy claims that,
23 after Milberg Weiss was appointed as co-lead counsel, it cut him
24 off the service list. His name, however, still appears on the ECF
25 docket sheet as an "Attorney to be noticed."

26 In late 2003, this case settled. On February 24, 2004, the
27 Court granted preliminary approval of the settlement agreement and
28

1 approved a notice program. Three months later, the Court approved
2 a ten million dollar settlement, awarded attorneys' fees to co-lead
3 counsel in the amount of twenty-five percent of the settlement and
4 entered final judgment. Messrs. Yusty and Jaramillo claim that
5 they never received notice of the settlement. Nor did Mr. Murphy
6 receive any compensation.

7 In October, 2006, after his clients contacted him to inquire
8 as to the status of the case, Mr. Murphy contacted Mr. Walton, who
9 told him about the settlement.

10 Mr. Murphy claimed that he was entitled to ten percent of the
11 legal fees awarded to Lerach Coughlin by the Court. Lerach
12 Coughlin responded that it found his belated request for attorneys'
13 fees "surprising," especially because Mr. Murphy's clients had no
14 involvement in the case other than filing the initial complaint and
15 Mr. Murphy had performed no work to further the prosecution or
16 settlement of the case. In January, 2007, after Mr. Murphy stated
17 that he intended to file a motion with this Court to recover his
18 referral fee, Lerach Coughlin offered to pay him \$15,000. Mr.
19 Murphy refused the offer.³

20 On April 10, 2007, Mr. Murphy called the claims administrator
21 about making claims for his three clients. The administrator
22 informed him that there was money remaining in the settlement

23
24 ³Lerach Coughlin's letter noted that Mr. Murphy had previously
25 accepted a \$15,000 referral fee in connection with the Smart
26 Modular securities litigation. There, Mr. Murphy also claimed that
27 he was owed ten percent of the fee award under a referral fee
28 arrangement. He filed a motion for an order directing Milberg
Weiss to pay him a referral fee. The motion was denied without
prejudice to Mr. Murphy bringing a separate action on his contract
claim.

1 account and that, if his clients submitted claim forms, the
2 administrator would promptly review the forms. To date, no claim
3 forms have been filed on behalf of Messrs. Yusty and Jaramillo.

4 On May 7, 2007, almost three years after the Court entered
5 final judgment in this case, Mr. Murphy filed these two motions,
6 requesting that the Court order Lerach Coughlin to pay damages and
7 sanctions to Messrs. Yusty and Jaramillo and to pay Mr. Murphy,
8 with interest, ten percent of the Court-approved attorneys' fee
9 that it received in this litigation.

10 DISCUSSION

11 I. Motion for payment of damages and imposition of sanctions

12 Mr. Murphy purports to bring this motion on behalf of his
13 clients. As noted above, however, Mr. Murphy is not admitted to
14 practice before this Court and has not filed a motion to appear pro
15 hac vice; according to the pleadings, he appears pro se. The Ninth
16 Circuit instructs that "a litigant appearing in propria persona has
17 no authority to represent anyone other than himself." Russell v.
18 United States, 308 F.2d 78, 79 (9th Cir. 1962). Therefore, the
19 Court need not, indeed cannot, address the motion's merit. The
20 motion is denied without prejudice.

21 II. Motion to compel Lerach Coughlin to allocate attorneys' fees

22 The Court's order awarding attorneys' fees and expenses in
23 this action provides, "Such fees and expenses shall be allocated
24 among Plaintiffs' Settlement Counsel in a manner which, in their
25 good-faith judgment, reflects each such counsel's contribution to
26 the institution, prosecution and resolution of the Litigation."
27 According to Lerach Coughlin, the fees were distributed in

1 accordance with the Court's order. No fees were awarded to Mr.
2 Murphy because he did nothing more than contact Mr. Walton, review
3 the complaint drafted by Milberg Weiss and forward the draft
4 complaint to his clients for review and approval. His involvement
5 in the case stopped in December, 2001. Then he seemingly forgot
6 about this case until October, 2006, when his clients contacted him
7 to inquire about the status of the case.

8 As explained in In re Cendant Corp. Securities Litigation, 404
9 F.3d 173, 197 (3d Cir. 2005), under the Private Securities
10 Litigation Reform Act, "only attorneys whose efforts create,
11 discover, increase, or preserve the class's ultimate recovery will
12 merit compensation from that recovery." Simply filing a securities
13 fraud complaint rarely warrants compensation. See id. Here, Mr.
14 Murphy provides no evidence that any of his actions created,
15 discovered, increased or preserved the class's ultimate recovery.
16 He did not even draft the original complaint; he just reviewed it
17 and passed it along to his clients. He claims no expenses, other
18 than those he has incurred since he discovered in October, 2006
19 that this case settled. See In re Versata, Inc. Sec. Litig., 2003
20 U.S. Dist. LEXIS 26578 (N.D. Cal.) (denying attorneys' fees to
21 firms which were not lead counsel but granting their expenses for
22 the filing fee and publishing a notice of it on Business Wire).

23 Even if there was a ten percent referral fee agreement in
24 place, which Lerach Coughlin denies, under the Court's order, Mr.
25 Murphy would not be entitled to the \$200,000 he seeks merely for
26 referring three clients, who did not suffer sufficient losses to
27 become lead plaintiffs, and then reviewing and passing on a draft
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1 complaint. As Mr. Murphy acknowledges in his motion, courts may
2 give deference to lead counsel's allocation of fees. Cendant Corp.
3 Sec. Litig., 404 F.3d at 197. The Court defers to Lerach
4 Coughlin's decision not to allocate any attorneys' fees to Mr.
5 Murphy.

6 Mr. Murphy's motion is denied.

7 CONCLUSION

8 For the foregoing reasons, the Court DENIES WITHOUT PREJUDICE
9 Horacio Yusty, Andres Jaramillo and Rodrigo Jaramillo's motion for
10 payment of damages and imposition of sanctions and DENIES Mr.
11 Murphy's motion to compel Lerach Coughlin to allocate attorneys'
12 fees to him (Docket No. 116).

13 IT IS SO ORDERED.

14
15 6/13/07

16 Dated: _____



CLAUDIA WILKEN
United States District Judge